
UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2015/174
UNDT/NBI/2015/175
UNDT/NBI/2015/176
Judgment No.: UNDT/2017/034
Date: 10 May 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NGERO
WANI
SEBUKAKARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Introduction

1. At the time of the events giving rise to these applications, the Applicants were staff members of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) who had been assigned to the United Nations Regional Service Centre in Entebbe (RSCE). On 30 November 2015, they filed separate applications before the United Nations Dispute Tribunal (UNDT) challenging the decisions by the Administration not to consider their requests to grant them compensation for breaches of United Nations obligations undertaking a full and proper investigation and obtaining a prior waiver of

2. The Respondent filed replies to the applications on 4 January 2016 contending that the applications were not receivable because: (i) the Applicants failed to request management evaluations of the impugned administrative decisions, and (ii) there have been no final administrative decisions within the meaning of the UNDT Statute.

3. On 23 January 2017, the Tribunal issued Order Nos. 014 (NBI/2017), 015 (NBI/2017) and 016 (NBI/2017) inviting the parties to submit their views in relation to the consolidation of the three cases. The parties were also informed that Procedure, that an oral hearing was not required in determining the preliminary issue of receivability in these cases and that it would and written submissions.

4. The Applicants and Respondent replied to the Orders on 26 and 27 January 2017, respectively more efficient to address the applications together.

5. On 10 February 2017, the Tribunal consolidated the three applications.

17. The Applicants in these three cases are seeking to revive claims that have expired by making new requests. The Applicants were arrested on 14 April 2012. If they wished to challenge any administrative decisions connected to the circumstances of their arrest on the grounds that the procedures in ST/AI/299 (Reporting of Arrest or

22. In the instant cases, the Applicants have requested *ex gratia* payments of compensation for alleged breaches of the procedures regarding the arrest of staff members and the waiver of their immunity. They have no right to such compensation. In effect, the Applicants are seeking payments by way of gift or favour, rather than payments of an entitlement that the Organization was obliged to pay under the terms of their appointment. By its very nature, the Cf o k p k u v t c v k q p ø u " t g u r q p u g " v q " a request for an *ex gratia* payments does not constitute an administrative decision under art. 2.1(a) of the UNDT Statute, as it does not relate to an entitlement and carries no direct legal consequences.

23. The Applicants are unable to show that any failure to reach decisions had direct legal consequences for them. In the absence of this, any failure to take a decision is not an administrative decision that may be challenged.

24. In any event, there has been no failure to make a decision. As was made clear to the Applicants in the communications from MONUSCO on 30 October 2015, further investigations are being carried out and the Applicantsø requests for compensation are being considered. A short delay regarding a request which is still under consideration cannot amount to a challengeable decision. Accordingly, there is no administrative decision capable of judicial review, and the applications should be dismissed as not receivable.

25. Administrative decisions, which are subject to review, are not always presented as affirmative decisions. They are sometimes in the form of a failure to act, which may be characterized as an implied administrative decision.

26. In these cases, the Applicants sought management evaluations of the refusal by the Administration to consider their requests for compensation, which was made on 5 October 2015. The failure of the Administration to formally reply (either granting or refusing the request) by the time the Applicants filed their management evaluation requests on 19 and 26 October 2015 constitutes implicit refusals.

27. Since the Applicants have not received formal written notifications, they were not in a position to challenge the explicit refusals to grant the requests but only the general failure of the Administration to consider their applications positively.

28. Following receipt of these requests, these matters were forwarded to MONUSCO which is the appropriate office for such a consideration. On 30 October 2015, the Officer-in-Charge of the Legal Affairs Office of MONUSCO

I have seen the request for compensation and am seeking to gather

Applicants *cpf"vjg" Cf okpkuvtcvkqpøu" tghwu*

38. Pursuant to staff rule 11.2(c), a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

When did the causes of action arise?

39. The impugned decisions are alleged failures by the MONUSCO for breaches of United Nations obligations concerning their detention and charging by

2012 and 3 July 2015, the Applicants went through the judicial process in Uganda and were subsequently acquitted.

42. From the foregoing, it is not unreasonable to infer that on 3 July 2015, having gone through the rigors of a criminal judicial proceeding and having been acquitted of all charges, the Applicants became aware that there may have been breaches of the applicable rules governing their arrest and detention as United Nations staff members and the waiver of their immunities.

43. All relevant non-work product paperwork, including the *Note Verbale*, should have been available to the Applicants' counsel voluntarily or upon request by this time. Even assuming, *arguendo*, that the Applicants were aware of the content of the *Note Verbale* at some earlier stage of the criminal proceeding, it would not have resulted in their release from custody sooner than the three or five days that they were detained before being charged and released. In other words, there was no need for the United Nations to take custody and control of the Applicants since they were already at liberty early in the proceedings. The acquittals might lend credence to the merits of their claims herein for damages. The Applicants might think twice about filing suit against the Secretary-General.

44. The Applicants' claims for remedies for the alleged breaches of the procedures under A/63/331 and ST/AI/299 arose on 3 July 2015. Accordingly, pursuant to staff rule 11.2(c) the Applicants were, therefore, required to seek management evaluation of the alleged breaches of the applicable rules governing their arrest and detention as United Nations staff members and the waiver of their immunities within 60 days

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Entered in the Register on this 10th day of May 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi